Lu Geok Hiok @ Lu Geok Hiok (f) v Wong Ching Kui

HIGH COURT (MIRI) — DIVORCE PETITION NO 33–131 OF 2010(MR)
STEPHEN CHUNG JC
30 MARCH 2012

Family Law — Divorce — Petition — Order granted — Application by respondent to set aside order — Whether petitioner failed to make full and frank disclosure of facts — Whether just and reasonable to make order — Whether order should be set aside — Custody — Custody of child upon dissolution of marriage — Interests of child — Whether custody should be given to petitioner

On 2 November 2008, the petitioner wife ('PW') had filed a divorce petition for, inter alia, the dissolution of her marriage to the respondent husband ('RH'), right of custody and care of their son ('the child') with reasonable access to the RH and a monthly maintenance of RM300 for the child. The PW filed for the divorce on the grounds that the marriage had irretrievably broken down and that the RH had deserted her since October 2008. The RH filed no defence in reply to the petition, which was served on him by substituted service by a publication in one issue of a local Chinese newspaper. The hearing of the petition was adjourned because the RH was absent. Although the RH was again absent at the continuation of the hearing, the court granted the petition for divorce because the marriage had irretrievably broken down and the PW and RH had not lived together as husband and wife since the time the RH left the PW in October 2008. The court also granted the PW custody and care of the child with reasonable access to the RH. There was no order made with regard to maintenance as PW had withdrawn her prayer for maintenance with liberty to apply in future. This was an application by the RH to set aside this order granted by the court. The RH, who did not wish to divorce the PW, claimed that the PW had falsely informed the court that he had deserted her for a continuous period of more than two years since October 2008. According to the RH he had been staying with the PW in a house belonging to her from March 2009 to 28 July 2009, and that when he had travelled to Taiwan on business on 29 July 2009, he had been arrested by the Taiwan for possession of prohibited goods. The RH further claimed that although the PW knew of his arrest and conviction, she had not been truthful in her evidence in court. It was the PW's evidence that the RH, who had been imprisoned in China from 24 March 2008 to 24 March 2009, had returned to stay with the family upon his release from prison. However, he had continued behaving irresponsibly,

incurring debts and not supporting the family. The PW also claimed that she was unaware of the RH's arrest and imprisonment in Taiwan.

Held, dismissing the application with no order as to costs:

(1) Although the issue as to whether the PW knew that the RH had been arrested and imprisoned in Taiwan was a fact in dispute, the fact remained that the marriage between the PW and the RH had irretrievably broken down. Based on the PW's averments that the RH was unemployed and gambling and based on the evidence of his arrests and imprisonment in China and Taiwan, the PW had established that the RH had behaved in such a way that the PW could not reasonably be expected to live with him. Thus, it was just and reasonable in the circumstances of this case to have made the order for the divorce with the custody and care of the child being given to the PW (see para 18).

(2) Based on the RH's criminal records, his gambling and unemployment, it was not suitable for him to have the custody of the child. It was in the interests of the child that he was in the custody and care of the PW (see para 19).

(3) The parties were directed to work out an arrangement for reasonable access of the child, failing which the court would appoint the time for the access (see para 20).

[Bahasa Malaysia summary

Pada 2 November 2008, pempetisyen isteri ('PI') telah memfailkan petisyen perceraian untuk, antara lain, pembubaran perkahwinannya kepada responden suami (RS), hak jagaan dan pemeliharaan ke atas anak mereka ('kanak-kanak tersebut') dengan akses munasabah buat RS dan nafkah bulanan sebanyak RM300 untuk kanak-kanak tersebut. PI memfailkan perceraian atas alasan bahawa perkahwinannya tidak boleh diselamatkan lagi daripada perpecahan dan bahawa RS telah mengabaikannya sejak Oktober 2008 lagi. RS tidak memfailkan sebarang pembelaan sebagai jawapan kepada petisyen tersebut, yang mana telah disampaikan kepadanya melalui penyampaian gantian dalam suatu penerbitan akhbar Cina tempatan. Perbicaraan petisyen tersebut ditangguhkan kerana RS tidak hadir. Walaupun RS sekali lagi tidak hadir pada perbicaraan seterusnya, mahkamah membenarkan petisyen untuk perceraian kerana perkahwinan tersebut tidak boleh diselamatkan lagi daripada perpecahan dan PI dan RS telah tidak tinggal bersama-sama sebagai suami dan isteri lagi semenjak RS meninggalkan PI pada bulan Oktober 2008. Mahkamah juga memberikan hak jagaan dan pemeliharaan kanak-kanak tersebut kepada PI dengan akses munasabah buat RS. Tiada perintah berkenaan nafkah dikeluarkan kerana PI telah menarik balik permohonan nafkahnya dengan kebebasan untuk memohon semula pada masa akan datang. Ini adalah permohonan oleh RS untuk mengetepikan perintah yang diberikan

oleh mahkamah. RS, yang tidak mahu menceraikan PI, mendakwa bahawa PI memberikan maklumat palsu kepada mahkamah bahawa dia telah ditinggalkan PI untuk tempoh berterusan selama lebih daripada dua tahun sejak Oktober 2008. Menurut RS, dia tinggal bersama-sama PI di sebuah rumah yang dimiliki oleh RS dari Mac 2009 hingga 28 Julai 2009, dan bahawa apabila dia ke Taiwan atas urusan perniagaan pada 29 Julai 2009, dia telah ditangkap oleh kerajaan Taiwan kerana memiliki barang larangan. RS juga menghujahkan bahawa walaupun mengetahui akan tangkapan dan sabitan tersebut, PI tidak jujur dalam memberikan keterangannya di mahkamah. Adalah menjadi keterangan PI bahawa RS, yang telah dipenjarakan di China dari 24 Mac 2008 hingga 24 Mac 2009, telah kembali untuk tinggal bersama-sama dengan keluarga mereka apabila dibebaskan daripada penjara. Walau bagaimanapun, dia meneruskan kelakuan yang tidak bertanggungjawab, berhutang dan tidak menampung keluarganya. PI juga menghujahkan bahawa dia tidak tahu mengenai tangkapan dan pemenjaraan RS di Taiwan.

Diputuskan, menolak permohonan tanpa perintah terhadap kos:

(1) Walaupun isu sama ada PI tahu bahawa RS telah ditangkap dan dipenjarakan di Taiwan adalah satu fakta yang dipertikaikan, fakta kekal bahawa perkahwinan antara PI dan RS tidak dapat diselamatkan lagi. Berdasarkan hujahan-hujahan PI bahawa RS menganggur dan suka berjudi dan berdasarkan bukti penangkapan dan pemenjaraannya di China dan Taiwan, PI telah membuktikan bahawa RS telah berkelakuan mana PI tidak boleh, secara munasabah, dijangka untuk hidup bersama-sama dengannya. Oleh itu, adalah adil dan munasabah dalam hal keadaan kes ini untuk memerintahkan perceraian dengan hak jagaan dan pemeliharaan kanak-kanak tersebut diberikan kepada PI (lihat perenggan 18).

(2) Berdasarkan rekod jenayah RS, perjudian dan penganggurannya, menjadikan dia tidak sesuai untuk mempunyai hak jagaan dan pemeliharaan ke atas kanak-kanak tersebut. Adalah menjadi kepentingan buat kanak-kanak tersebut berada dalam jagaan dan pemeliharaan PI (lihat perenggan 19).

(3) Kedua pihak telah diarahkan untuk membuat suatu aturan bagi akses yang munasabah ke atas kanak-kanak tersebut, yang mana jika gagal, mahkamah akan memerintahkan masa untuk akses (lihat perenggan 20).]

Notes

For cases on petition, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3840–3846.

Cases referred to

Chong Lay Kwong v Lim Lay Kuan [2001] MLJU 137; [2001] 2 CLJ 492, HC (refd)

PECD Bhd & Anor v AmTrustee Bhd and other appeals [2010] 5 MLJ 357; [2010] 1 CLJ 940, CA (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 53(1), (2)

Muhammad Suhaili bin Othman (Suhaili & Ling Advocates) for the petitioner. Nicole Jolly (Khoo & Co Advocates) for the respondent.

Stephen Chung JC:

[1] The petitioner was married to the respondent on 8 January 2008. They have one child from their relationship, a son Lu Qui Zhuin who was born on 29 January 2007, prior to their marriage. The petitioner has two other sons from a previous marriage, Gibson Tan and Nickleson Tan, who are in the custody and care of the petitioner.

[2] On 2 November 2008, the petitioner filed a petition for divorce on the grounds that the marriage has irretrievably broken down and that the respondent has deserted the petitioner since October 2008.

[3] The petition was served on the respondent by substituted service by a publication in one issue of a local Chinese daily newspaper. The notice of hearing of the petition was similarly served by another publication of the notice in an issue of the local Chinese newspaper. There was no answer or defence filed in reply to the petition. The respondent was absent on 15 April 2011, the date of hearing of the petition.

[4] At the hearing, the petitioner applied and was granted leave to amend the petition by including two prayers (a) that the petitioner be given the custody and care of Lu Qui Zhuin with reasonable access to the respondent and (b) for a sum of RM300 as maintenance for the child which prayers were not stated in the petition. The petitioner also applied to include a prayer for the custody and care of Gibson Tan and Nickleson Tan.

[5] During the hearing of the petition, the petitioner testified that she did not know where the respondent was, whether he was gainfully employed and whether he would be able to pay the maintenance prayed for by the petitioner. Counsel for the petitioner then applied for the hearing to be adjourned to

another date for the petitioner to obtain more information and to consider whether she wished to continue with the prayer for maintenance. The hearing was adjourned to 20 May 2011.

[6] At the continuation of the hearing, the petitioner decided to withdraw the prayer for maintenance against the respondent with liberty to apply in future. The court granted the petition for divorce because the marriage has irretrievably broken down, that the petitioner and the respondent have not lived together as husband and wife since October 2008 when the respondent left the petitioner. The petitioner was granted the custody and care of Lu Qui Zhuin with reasonable access to the respondent. She was also granted the custody and care of Gibson and Nickleson.

[7] This is an application by the respondent to set aside the order of substituted service of the petition and the order granted by the court on 20 May 2011 on the grounds that the order was obtained ex parte and that the petitioner had falsely and/or fraudulently informed the court that the respondent had deserted the petitioner for a continuous period of more than two years since October 2008.

[8] The respondent in his affidavit in support of the application affirmed that he was in a relationship with the petitioner for many years prior to their marriage and they have been living in a house belonging to the petitioner at Lot 1425, Pujut 2C, Miri.

[9] He said that from March 2009 to 28 July 2009 he was staying in the house with the petitioner and the children and it was not true that he had deserted the petitioner since October 2008 as alleged by the petitioner. He said that during this time he did the house chores including painting the exterior of the house.

[10] He said that on 29 July 2009 he travelled to Taiwan via Kota Kinabalu on a business trip. He said he was arrested by the police in Taiwan on 2 August 2009 for possession of prohibited goods, was found guilty and sentenced to a term of imprisonment of two years. He said that, after his arrest and prior to his conviction, he had telephoned the petitioner to keep her informed. He said that after his conviction he was allowed to telephone the petitioner every three months. He said that therefore the petitioner knew where he was and had not been truthful in her petition and in her evidence in court.

[11] The respondent said that after he finished his sentence, he returned to Miri on 4 October 2011 and was shocked to find out that the petitioner had divorced him and refused to let him into the house or to let him have access to their child. He said that since then he has tried but has been denied access to the

child of the marriage. The respondent said that he does not wish to divorce the petitioner nor agrees to the terms of the divorce.

[12] The petitioner in her affidavit in opposition, although denying that she had failed to make a full and frank disclosure in her petition and evidence in court, has said that it was made in the best interests of the children rather than revealing the dark side of the respondent. She said that the respondent was an irresponsible person, did not have a proper job, was involved in online gambling and heavily indebted to his friends. She said that he constantly asked her for money and she was beaten once by him in the presence of her eldest son when she refused to give him any money.

[13] She said that the respondent was arrested in Guangzhou, China and imprisoned from 24 March 2008 to 24 March 2009 for possession of prohibited goods. She said that after he completed his sentence in China, the respondent came back and stayed with the family but he remained unchanged and she had to support the family on her own with the help of her sister and family.

[14] The petitioner said that the respondent did not tell her he was going to Taiwan. She said the respondent only told her he was going to Kota Kinabalu and asked for RM1,500 for the expenses for his trip. She disputed and denied that he had telephoned her from Taiwan and had informed her of his arrest and imprisonment.

[15] An order obtained ex parte by the petitioner may be set aside by the court on an application by the respondent on the ground that the petitioner in obtaining the order did not make a full and frank disclosure of the facts to the court see *Chong Lay Kwong v Lim Lay Kuan* [2001] 2 CLJ 492, *PECD Bhd & Anor v AmTrustee Bhd and other appeals* [2010] 5 MLJ 357; [2010] 1 CLJ 940. In this case, the averment by the petitioner that the respondent had deserted her and the family since October 2008 was not true because she had in her affidavit admitted that the respondent had stayed with the family from about the end of March 2009 after he came back from China until 29 July 2009 when he left for Kota Kinabalu. She explained that it was to protect the interests of the children.

[16] However, she disputed that the respondent had telephoned her from Taiwan and had informed her of his arrest and imprisonment there. She denied that she knew where he was after he left for Kota Kinabalu. The respondent's brother has affirmed an affidavit stating that the respondent had telephoned him from Taiwan informing him of the arrest and asking him to send some money to the petitioner. He said he did as requested by the respondent but he did not say that he informed the petitioner about the respondent's arrest nor

did he say that the petitioner knew of the respondent's arrest in his affidavit. If she did not know of his arrest and imprisonment in Taiwan as she had averred in her affidavits, then she did not know where he was after he left for Kota Kinabalu. If she knew where he was, then she had lied and the order granted by the court ought to be set aside. Based on the affidavits, whether the petitioner knew that the respondent had been arrested and imprisoned in Taiwan is a fact in dispute.

[17] Section 53(1) of the Law Reform (Marriage and Divorce) Act 1976 provides that either party to a marriage may petition for a divorce on the ground that the marriage has irretrievably broken down. Section 53(2) provides that the court hearing such a petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution.

[18] Based on the affidavits, the fact remained that the marriage between the petitioner and the respondent has irretrievably broken down notwithstanding that he does not wish to divorce her. Based on the petitioner's averments that he was unemployed and gambling, in particular his arrest and imprisonment in China and Taiwan for possession of prohibited goods respectively, the petitioner has established that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him. The affidavit evidence showed that he was arrested and imprisoned for possession of illicit drugs in China. The respondent did not deny these averments. It was just and reasonable in the circumstances of this case to have made the order for the divorce with the custody and care being given to the petitioner.

[19] Based on his criminal records, his gambling and he being unemployed, it is not suitable for the respondent to have custody of the child of the marriage. One year after the child was born, the respondent was in prison in China for a year. Barely six months after his release from prison in China, he was again sentenced to prison in Taiwan for two years. All these while, the child has been looked after by the petitioner. It is in the interests of the child that he is in the custody and care of the petitioner.

[20] The order of the court given on 20 May 2011 gave reasonable access of the child to the respondent. The petitioner in her affidavit has affirmed that he has had access five times since he came back to Miri. She said that sometimes she refused to let him have access because he wanted access at odd hours and they were not pre-arranged. Counsel for the parties should advise their respective client on the court's order for reasonable access and work out an arrangement for such access failing which the court will appoint the time for the access.

[21] During the hearing of this application, counsel for the respondent advised that the respondent has no interest to have custody of Gibson and Nickleson.

[22] For the reasons given, this application is dismissed with no order as to cost.

Application dismissed with no order as to costs.

Reported by Kohila Nesan